

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7079

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To be argued by

HERBERT S. KASSNER

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UNITED STATES COURT OF APPEALS

For The Second Circuit

F.X. MAITZ, LTD.,

Plaintiff-Appellant,

v.

ROBERT MORCHINIAU, Individually and as District
Attorney of the County of New York, and
MICHAEL CORD, Individually and as Police Commissioner
of the City of New York,

Defendants-Appellees

BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF FACTS

F.X.MALTZ, LTD., the Plaintiff-Appellant herein (and referred to as "plaintiff" for purposes of clarity and brevity) is the operator of a theatre in midtown Manhattan which exhibits sexually oriented motion picture films to forewarned consenting adults.

In the past year or two, there has been a proliferation in midtown Manhattan of premises, including bars, burlesque theatres and, also, other movie theatres, which offer their patrons live topless and/or nude dance performances by professional dancers. As a result of such competition from such other premises in the area patronage at Plaintiff's theatre has fallen off drastically, to Plaintiff's considerable economic detriment (See Affidavit of ERNESTO VELAZQUEZ, plaintiff's manager, at pp. 15-19 of Appendix).

The Plaintiff desires to add live nude dance entertainment to its program, in addition to films, in the hope of recovering part of the patronage which it has lost. It is Plaintiff's belief, and also Plaintiff's intention, that the nude dancing proposed to be offered by Plaintiff, could, and would, be performed in a non-obscene manner. There is ample authority for the principle that dancing

even nude dancing in a bar, constitutes expression presumptively protected by the First Amendment. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546; Schacht v. U.S., 398 U.S. 58; Salem Inn v. Doran, 422 U.S. 922; Jenkins v. Georgia, 418 U.S. 153, 161.

The Plaintiff, however, has been dissuaded from adopting a program offering nude live dance performances by its observation of the policies of Defendants CODD and MORGENTHAU in arresting and prosecuting performers and managers at establishments, including nearby movie theatres, which offer nude live dance performances. As stated in Plaintiff's complaint (see pp. 7 & 8 of Appendix) and in the Affidavit of Plaintiff's manager (pp. 16 & 17), a policy has been routinely followed whereby policemen of the City of New York enter premises where nude dance performances are offered and, based solely upon said police officers' ad hoc determinations of obscenity, make warrantless arrests of the performers and managers, thereby halting the shows in the midst of exhibition. In the papers and proceedings below the Defendants have not denied that arrests are routinely made by their agents in this fashion-as indeed, they cannot deny it-and thus the existence of such policies and practices must be treated as established for purposes of considering the dismissal of the complaint below.

The Plaintiff, sincerely believing that the above-

stated arrest policies of Defendants fail to comport with the guidelines enunciated by the Supreme Court for the protection of expression presumptively protected by the First Amendment, filed the instant action in the District Court, claiming a deprivation of civil rights guaranteed to it under the First, Fourth and Fourteenth Amendments of the United States Constitution (See Plaintiff's Complaint, pp.5-12 of Appendix). Broadly stated, and as more fully developed in the arguments below, it was and is plaintiff's position that, under applicable Supreme Court precedent, expressive material which by its nature is presumptively protected under the First Amendment, may not be subjected to prior restraints by having its dissemination or distribution halted on grounds of obscenity, whether by seizure or arrest, except after a searching focus on the question of obscenity by a disinterested judicial magistrate. (See, generally, Point II infra). The reasoning of the Supreme Court, again to be more fully developed below, is founded upon the repugnancy to First Amendment values of leaving the determination of obscenity to law enforcement personnel in the field, thereby constituting policemen as censors, at least where such policy determination and the resulting seizure or arrest by the law enforcement personnel thereby results, as in the case of the practices of the defendants herein,

in the immediate and effective termination of the dissemination of the expression in question.

The statute under which the Defendants claim authority for their practice of making on-the-spot warrantless arrests of nude dancers and their managers, and the constitutionality of which Plaintiff seeks to challenge, at least as applied in such instances, is Section 140.10(1), which purports to authorize a police officer to arrest a person for "any offense when he has reasonable cause to believe that such person has committed such offense in his presence..." It is plaintiff's position, which was rejected below, that this statute cannot be applied, consistently with the requirements of the First Amendment as interpreted by the Supreme Court, to effectuate the arrest of an entertainer in mid-performance on grounds of alleged obscenity without thereby impermissibly constituting the police as censors and thereby creating a prohibited prior restraint of the most chilling and inhibiting sort.

On January 21, 1977, upon motion of the Defendants, Judge Inzer B. Wyatt of the Southern District of New York, before whom the cause appeared, by handwritten endorsement, ordered dismissal of Plaintiff's complaint, with the following words of explanation:

"the motion is granted. There is nothing to show that if plaintiff employs nude dancers they would violate the law by obscene performances

or that if they do the police will arrest them. If despite my views there is a case or controversy, I find the statute constitutional on its face and as applied in the case of plaintiff operators. At the request of plaintiff's and over the objections of defendants, I assume that plaintiff made a motion for summary judgment and such motion is denied. The Clerk is directed to enter judgment for defendants."

From the above, it is seen that Plaintiff's action was dismissed both for an alleged lack of standing or justiciable claim, and also on the merits. It is respectfully submitted, for the reasons which follow, that the dismissal was in all respects in error.

1-Plaintiff has standing, and a live controversy exists, under the special rules applicable in cases alleging chilling effects upon first amendment rights.

2-Dismissal on grounds of lack of a live controversy is improper and unfair, inasmuch as to wait for arrest would entail preclusion under Younger, and this result of dismissal here is to entirely deprive plaintiff of federal forum to which he has right for adjudication of first amendment claims.

3-Defendants' motion papers and Judge's order of dismissal based thereon misplace the issues which are not whether plaintiff's dances will be obscene, nor whether dancers will be arrested. Rather, the issue is plaintiff's right to exhibit dance performances, obscene or not obscene, without fear of restraint or interruption which is not preceded by judicial

scrutiny and determination of obscenity vel non.

4-The Statute and practices of defendants thereunder are constitutionally improper in not providing for prior judicial scrutiny as a condition precedent to the total restraint of the dissemination of the presumptively protected expression effected by the arrests thereunder.

5-Plaintiff's pleadings and papers, which are not controverted, show real harm to plaintiff, and entitle plaintiff to injunctive and declaratory relief, or at least declaratory relief as to which the burden of showing harm is less.

POINT I

PLAINTIFF HAS STANDING AND THE
COMPLAINT ALLEGES A CASE AND
CONTROVERSY UNDER THE FIRST
AMENDMENT EXCEPTIONS AIMED AT
SWIFTLY REMOVING THE CHILL OF
OVERBROAD STATUTES WHICH INHIBIT
THE EXERCISE OF FIRST AMENDMENT
RIGHTS

As the owner of the theatre exhibiting sexually oriented films in Midtown Manhatta, many of whose competitors are offering live nude dance performances as part of the program of entertainment, and are thereby being subjected to enforcement of the arrest statute attacked herein, there can be no doubt that plaintiff who desires to exhibit such dance performances and is being inhibited from doing so because of enforcement of the statute, has a prime interest in the adjudication of its constitutionality. Were plaintiff to subject itself and its employees to criminal prosecution under the said statute by commencing to offer such exhibitions to its patrons, he would be barred from access to federal jurisdiction by virtue of the clear mandates of Younger v. Harris 401 U.S. 37. To say on the one hand, that as a condition precedent to obtaining federal jurisdiction, plaintiff must refrain from becoming involved in a criminal prosecution under the statute which he attacks, and, on the other hand to state that refraining from such criminal prosecution denies

it standing to attack the statute in the Federal Court, is to abrogate the entire body of First Amendment Civil Rights jurisdiction in violation of the basic principals of constitutional adjudication in this area running from Dombrowski v. Pfister, 380 U.S. 479 through Zwickler v. Koota, 389 U.S. 241 and Steffel v. Thompson, 450 U.S. 452. As was said in Zwickler v. Koota, supra, at 252:

"...Congress imposed the duty upon all levels of the Federal Judiciary to give due respect to a suitor's choice of a Federal forum for the hearing and decision of its Federal constitutional claims. Plainly, escape from that duty is not permissible merely because State Courts also have the solemn responsibility, equally with the Federal Courts '...to guard, enforce and protect every right granted or secured by the Constitution of the United States...' Robb v. Connolly 111 U.S. 624. We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." "The principles have particular significance when, as in this case, the attack upon the statute upon its face is the repugnancy to the First Amendment. In such a case to force the plaintiff who has commenced a Federal action to suffer the delay of State Court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."

As was said in Steffel v. Thompson supra, at 475:

"Regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied."
(Emphasis supplied)

Surely defendant cannot assert herein that if plaintiff offered the live dance performances in its theatre which are presently offered by its competitors in nearby theatres, it would be less subject to the summary restraints and arrests which have befallen its competitors and which have been argued by defendants to be warranted by the statute in question herein. The fact that plaintiff is refraining from putting on such exhibition and subjecting itself and its employees to the prosecutions suffered by its competitors in the area under the statute attacked herein cannot conceivably deprive plaintiff of standing in a First Amendment case.

In Times Film Corp. v. Chicago, 365 U.S. 43, standing and case and controversy were held to exist where an exhibitor challenged a statute as effecting a prior restraint. There, as here, the exhibitor refused to disseminate the expression and subject itself to sanctions under the challenged statute prior to adjudication of the constitutional issue. It cannot be denied that the rules of standing with respect to First Amendment matters clearly differ from those involving other constitutional adjudications. Smith v. California, 361 U.S. 147; Coates v. City of Cincinnati, 402 U.S. 611; NAACP v. Button, 371 U.S. 415; Gooding v. Wilson, 405 U.S. 518; Grayned v. City of Rockford, 408 U.S. 104. Thus, in Grayned, the court permitted

an attack of overbreadth on a speech inhibiting statute by a person who did not even claim that, as applied to him, the statute was constitutionally overbroad. Similarly, in Police Department v. Mosley, 408 U.S. 92, the person attacking the speech inhibiting legislation carefully refrained from violating the law in question and attacked on the basis of its inhibiting him from doing what he thought should be permissible under a constitutional statute. This is the identical case to that herein. In Police Department v. Mosley, the picketer carefully refrained from violating the statute by coming closer to the school than the reach of the statute proscribed. In the instant case plaintiff is avoiding the putting on of the exhibition which could subject him to the arrest under the statute in question herein.

As was said in Gooding v. Wilson supra, at 521:

"The transcendental value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity,' (citations omitted). This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."

It is the susceptibility of overbreadth and unconstitutional inhibition of protected expression which lies at the foundation of the expansion of standing rules when First Amendment issues

are involved.

In Smith v. California, supra, at 151, the court emphasized its clearly evinced intention to permit divergence from customary principles of constitutional adjudication in First Amendment cases, and not to require people to act at their peril and subject themselves to "the expense and inconvenience of criminal prosecution" as a condition precedent to securing federal adjudication of constitutional issues involving speech inhibiting statutes.

In light of the current laws of abstention, to deny plaintiff herein the opportunity to subject the statute herein to the constitutional adjudication of this court would result in the complete divestiture of Federal Civil Rights Act jurisdiction in First Amendment cases. While it is true that access to the United States Supreme Court by way of certiorari would be available, the lower Federal Courts would be completely inaccessible to those who seek to challenge state inhibiting statutes under the Civil Rights Acts.

POINT II

CPLR 140.10, AS CONSTRUED TO PERMIT THE ARREST OF DANCES AND SUMMARY HALTING OF THEIR PERFORMANCES, WITHOUT PRIOR JUDICIAL DETERMINATION OF THE OBSCENITY VEL NON OF THE PERFORMANCES, IS VIOLATIVE OF THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS AS AN OVERBROAD ESTABLISHMENT OF A PROCEDURE FOR UNCONSTITUTIONAL PRIOR RESTRAINTS.

THE LAW

In a virtually identical case to that herein, a three judge Federal District Court panel in Arizona, in Attwood v. Purcell 402 F. Supp. 231 (1975), held at 236-7:

"Even if it were possible to narrow A.R.S. 13-531 so as to cure its vagueness and overbreadth, the statute would be unconstitutional as applied. Censorship is a frightening and powerful weapon as the Supreme Court observed in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 533...

"In the instant case the police officer acts as a censor for all intents and purposes. After he has made the determination that a dancer is violating A.R.S. 13-531 he exercises the most effective form of prior restraint by arresting the dancer during the performance or immediately thereafter thus precluding further performances by that dancer while she is being processed through "booking" and subsequent bail procedures of the City of Phoenix.

We are of the opinion that such prior restraint violates the procedural safeguards that have been constructed to protect First Amendment freedoms. The Supreme Court has noted on several occasions that such arrests or seizures must be preceded by the independent judgment of a disinterested magistrate. See Heller v. New York...; Roaden v. Kentucky..."

The foregoing case involved an action by topless dancers, not the cast of the Ballet Africans, but the law involved is indistinguishable.

No citation is required any longer for the hornbook principle that dancing, even nude dancing in a bar, constitutes expression presumptively protected by the First Amendment. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546; Schacht v. U.S., 398 U.S. 58; Salem Inn v. Doran, 422 U.S. 922. As was noted by Judge Oakes in footnote 3 of Salem Inn v. Doran, 501 F.2d 18:

"While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by Judges) or in quality (as viewed by critics) it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some entertainment with his beer or shot of rye".

The Court thus held that the topless dancing constituted expression presumptively protected by the First Amendment and its decision was upheld by the United States Supreme Court in Doran v. Salem Inn, 422 U.S. 922.

If there is any fundamental principle established by the First Amendment, it is that expressive activity cannot be prohibited or subjected to a prior restraint by reason of its message, ideas, subject matter or content. Cohen v. California, 403 U.S. 15; Street v. New York, 394 U.S. 576; New York Times Co. v. Sullivan, 376 U.S. 254; Police Department v. Mosley, 408 U.S. 92. As was said in Police Department

ment v. Mosley, supra at 95:

"But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content...The essence of this forbidden censorship is content control. Any restriction on expressive activity, because of its content, would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." New York Times Co. v. Sullivan,..."

Although the Supreme Court has held that material which is "obscene" falls outside the protection of the First Amendment, Roth v. U.S. 354 U.S. 476, the high Court, in recognition of the important values embodied in the First Amendment, has taken great pains to assure that suppression of presumptively protected material upon grounds of alleged "obscenity" take place only after judicial scrutiny of the material. The Statute in the instant case, and the arrest procedures authorized thereby manifest a gross failure to comply with the Supreme Court's applicable standards with regard to procedures which effect a halt of the exhibition or dissemination of presumptively protected expression and, therefore by such prior restraint, inhibit and chill the exercise of First Amendment rights.

The arrest of a live dance performer in the midst of her performance on grounds of obscenity is as violative

of the First Amendment, guaranteeing freedom of expression, as the arrest of the projectionist in a theatre and the seizure of the film since both acts effect a total restraint upon the dissemination of expression. Especially with regard to the First Amendment, not only are the rights of the owner of the exhibitor involved, but also the rights of the performing artists and audience are significantly at stake. This confluence of rights under the First and Fourth Amendments, and of the rights on behalf of more than one person, was examined by the Supreme Court in Roaden v. Kentucky, 413 U.S. 496 (1973), where the Court was led to conclude that a "higher" than ordinary "hurdle" must be met in the issuance of warrants for the seizure of expressive matter, as opposed to non-expressive matter.

The Court there stated:

The Fourth Amendment proscription against unreasonable ... seizures, applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material... The seizure of instruments of a crime, such as a pistol or a knife, or contraband or stolen goods or objects dangerous in themselves... are (sic) to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards". 413 U.S. at 501-502.

The Court in Roaden, after reviewing earlier decisions, continued:

"In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression." (Emphasis added). 413 U.S. at 504.

Thus, Roaden held that a seizure which effects a prior restraint within the meaning of the First Amendment constitutes an unreasonable search and seizure under the Fourth Amendment.

The exact reasoning pertains to an arrest which halts the dissemination of presumptively protected expression.

In seeking to protect First Amendment rights, the Supreme Court early established that where a seizure is "massive," as with the confiscation of a mass of printed material, an adversary hearing prior to seizure is required. Marcus v. Search Warrant, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127

(1961). Since "seizing a film then being exhibited to the general public presents essentially the same restraint on the expression as the seizure of all the books in a bookstore," Roaden v. Kentucky, supra at 504, the same principles apply thereto. The foregoing may be paraphrased by saying "arresting a live dance performer in the midst of her performance effects essentially the same restraint as seizing a film then being exhibited to the general public or seizing all of the books in a bookstore." See Bethview Amusement v. Kahn, 416 F.2d 410.

Later, in Heller v. New York, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973), the Court engrafted an exception upon the adversary hearing principle of Marcus, holding that where the seizure of a single item of presumptively protected expression is desired for use as evidence in a subsequent prosecution, the conduct of a prior adversary hearing, prior to seizure of the evidence, with its attendant risk that the item might be destroyed or removed, is not always practicable. 413 U.S. at 493. The Court in Heller nevertheless recognized that where the item or items seized are copies of a film then being publicly exhibited, the effect of the seizure, in terms of its operation as a prior restraint and in terms of the denial of the public's access, is the equivalent of a "massive" seizure. 413 U.S. at 492-493. Thus, although the Court in Heller approved an alternative procedure to the requirement of a prior adversary hearing in cases of seizures of a single print

of a publicly exhibited film to be used as evidence in a prospective obscenity case, the Court allowed omission of the prior adversary hearing only upon the condition that other stringent procedural safeguards be complied with. These requirements, as stated in Heller, are: (1) that the seizure be of only "a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding", (2) that the exhibitor be promptly thereafter afforded an opportunity to contest the obscenity issue in an adversary proceeding; (3) that, in addition, pending determination of the obscenity issue, the exhibitor be permitted to copy or use the film so as to be able to continue its exhibition; and (4) that the seizure be "pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate." 413 U.S. at 492-493. None of the foregoing safeguards are afforded in the case of an arrest of a live performer in the midst of her performance.

The first three of the above-cited four requirements are closely related and are all based on the consideration that a seizure (affecting a prior restraint) without a prior adversary determination is permitted only for the purpose of preserving evidence. The seizure must be limited to a single copy and efforts at accommodation, to permit the continued exhibition of the film pending adversary determination of the film's obscenity, must thereafter be made by law enforcement and judicial administrators. The clear thrust of Heller is that

any seizure in this type of case resulting in more than the "minimal interference with public circulation pending litigation" (413 U.S. at 493) which is necessary to the preservation of evidence violates the First Amendment by imposing an illegal prior restraint.

In the instant case, the law enforcement officials totally halted the live dance performances by means of the warrantless arrests in the midst of the performance, clearly evidencing the intention to suppress and effect a total prior restraint upon the exhibition of the performance. Furthermore, there was no evidence gathering motivation underlying the arrests. Such arrests which effected the same prior restraint as seizures not only violated the specific command of Heller that seizure be limited to a single copy, but, more fundamentally, reveals that the real intended purpose of the arrest was to stop the performance in the midst of its exhibition in violation of the First Amendment. The arrests under the Statute without warrant or the prior judicial scrutiny present in Heller thus denied the presumptively protected nature of the performance and constituted a prior restraint of the very sort which the Supreme Court took aim against in Marcus v. Search Warrant and Heller v. New York. Thus, by the overly broad scope of the Statute authorizing the warrantless arrests of live performers the First Amendment was violated.

The fourth of above-discussed requirements for a preadversary hearing seizure set forth by the Supreme Court in

Heller is that the seizure must be made pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, 413 U.S. at 492. The approved procedure in Heller involved prior scrutiny by the judge of the film alleged to be obscene, determination by the judge of the obscenity vel non thereof, and the issuance by the judge of a warrant for the seizure of one copy of the film.

Where as here, the prior restraint occasioned by the arrest and summary prior restraint of the exhibition under the Statute is conducted without a prior adversary hearing, the need to assure the intervention of a judicial mind by requiring the issuance of a Constitutionally sufficient warrant becomes all the more urgent. In Marcus v. Search Warrant, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961), the Supreme Court held that procedures followed under a state statute in the seizure of a mass of printed, allegedly obscene publications violated the First Amendment. The Court proceeded from the premise that the "power of search and seizure [can] be an instrument for the stifling of liberty of expression." 367 U.S. at 729. Although conceding that obscene material "is not within the area of constitutionally protected speech or press," 367 U.S. at 730, the Court emphasized the requirement for "safeguards...to assure non-obscene material the constitutional protection to which it is entitled." 367 U.S. at 731. The Court concluded in Marcus that in order to avoid a prior restraint in violation of constitutional guarantees, there must be a "step in the procedure before seizing designed to focus searchingly on the question of obscenity." (Empha:

added). 367 U.S. at 732.

The Court squarely addressed the question of necessity for a warrant prior to an "obscenity" seizure in the case of Roaden v. Kentucky, supra, holding that the seizure of a film by a sheriff, after the sheriff's viewing of the film and upon the sheriff's conclusion that the film was obscene, violated the First and Fourth Amendments and required reversal of the exhibitor's conviction. The defect found by the Court was again the absence of a step in the procedures prior to seizure affording "a magistrate an opportunity to 'focus searchingly on the question of obscenity.'" 413 U.S. at 506.

The mere obtaining of a piece of paper from a magistrate entitled "Search Warrant", however, clearly does not suffice to meet First and Fourth Amendment requirements for the seizure of expressive material. It requires no great perspicacity to appreciate that a warrant issued by a magistrate upon the basis of a police officer's conclusion that a film is obscene stands on no different footing than no warrant at all. Lee Art Theatre v. Virginia, 392 U.S. 636 (1968). The criterion, which is not satisfied in this situation (any more than it was in Roaden) remains that of whether the magistrate has "focused searchingly" on the issue of obscenity. Thus, in Marcus v. Search Warrant, 367 U.S. 717 (1961), there was a search warrant, but the Supreme Court held it constitutionally insufficient because:

"...the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant

to be obscene." 367 U.S. at 731-732.

The same defect in a warrant, requiring reversal of an exhibitor's conviction, was found by the Supreme Court in Lee Art Theatre v. Virginia, 392 U.S. 636 (1968), a case presented on the same footing and under facts identical to those in the instant case. In Lee Art Theatre an allegedly obscene film was seized:

"under the authroity of a warrant issued by a justice of the peace on the basis of an affidavit of a police officer which stated only the titles of the motion pcitures and that the officer had determined from personal observation of them and of the billboard in front of the theatre that the films were obscene." 392 U.S. at 636.

The Court here stated:

"The procedure under which the warrant issued solely upon the conclusory as-
sertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure "designed to focus searchingly on the question of obscenity," and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." 392 U.S. 637.

Nothing could be more clear than the absolute requirement that no prior restraint be effected upon the exhibition of pre-
sumptively protected expression (whether occasioned by arrest, seizure or both) without prior focusing of a judicial mind upon

the issue of the obscenity of the expression. Under the Statute prior restraints are authorized and carried out regularly without such constitutionally mandated safeguard.

Furthermore, it is ludicrous to suppose that the officers, in making their ad hoc judgments of the obscenity of the live performances prior to arrest of the performers undertook an evaluation under the Supreme Court's carefully drawn complex and crucially important tri-partite test of obscenity. In any event, this would not be an adequate substitute for a searching determination by a Judge of such issue.

The common thread running throughout the Supreme Court's opinions in Marcus v. Search Warrant, Roaden v. Kentucky, Lee Art Theatre v. Virginia, and Heller v. New York, supra is that expressive matter is presumptively protected; that its prior restraint, even temporarily, is as seriously violative of the First Amendment as any permanent and final seizure; and that therefore, before there can be such a restraint upon dissemination of expression, there must be "a step in the procedure...designed to focus searchingly on the question of obscenity." Marcus v. Search Warrant, 367 U.S. 717, 732. The further meaning of these cases, if they mean anything at all, is that the "focusing search," involving necessarily, as it does, application of the substantive obscenity standards, must be undertaken by "a disinterested magistrate" and not, as here, by law enforcement

personnel in the field.

In Marcus v. Search Warrant, the Court stated, after noting "the complexity of the test for obscenity," 367 U.S. at 730,

[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn...The separation of legitimate from illegitimate speech calls for... sensitive tools

"...[D]iscretion to seize allegedly obscene materials cannot be confided to law enforcement officials"...367 U.S. at 371, 373.

In Lee Art Theatre v. Virginia, the Supreme Court spoke of "the constitutional requirements demanding necessary sensitivity to freedom of expression," 392 U.S. at 637, and in Roaden v. Kentucky it posited "[t]he constitutional impossibility of leaving the protection of those freedoms to the whim of [law enforcement] officers..." 413 U.S. at 504-505.

To say that the procedures followed under the Statute, warrantless arrest of live performers in the midst of their performances based solely upon the ad hoc determination of a police officer of the complex issue of obscenity, complies with the constitutionally mandated procedure requiring a magistrate "to focus searchingly on the question of obscenity," prior to any restraint on expression, Marcus v. Search Warrant, 367 U.S. at 732, and is "adequate to avoid suppression of constitutionally protected [material]" ibid, 367 U.S. at 731, borders on the absurd. That this is so, may be appreciated all the more fully

when one bears in mind the Supreme Court's numerous statements to the effect that obscenity inheres not in the portrayal of one sex act or another, but rather in the manner of presentation and in the contextual entirety of the work.

Prior to the placing of any restraint upon the distribution of books and printed matter, the Supreme Court has indicated that a magistrate must personally view the material before issuing a warrant for its seizure. In Marcus v. Search Warrant, 367 U.S. 717, 732, fault was found with the fact that:

"the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene."

This is undoubtedly the case with movies, as well, since only by personally viewing a film is a magistrate able to "focus searchingly on the question of obscenity", and apply the myriad complex factors which go into making that determination.

Although the Supreme Court in Lee Art Theatre v. Virginia, 392 U.S. 636, 637, declined to hold that the justice of the peace in that case was required to have viewed the motion picture before issuing the warrant, it did so only upon the basis that such a holding was unnecessary to the decision of the case. This declination by the Court must be viewed against its later decision in Heller v. New York, 413 U.S. 483 (1973), where under the only prior restraint procedures yet to be thoroughly approved

by the Supreme Court for cases of this type, the judge did in fact personally view the film prior to issuing a warrant for its seizure. Although members of the bench might smart somewhat under the suggestive newspaper cartoons which their visits to movie houses could spawn, it is respectfully submitted that only under a rule requiring a magistrate to view expressive material prior to ordering its restraint, either by arrest, seizure, or both can the constitutional requirement of a "searching focus" upon the issue of obscenity prior to such restraint be complied with in any meaningful fashion. Also, although there is a somewhat greater imposition upon judicial resources in the case of requiring a judge to view a live dance performance as opposed to looking at printed matter, this added inconvenience has been required with respect to films and becomes insignificant when it is remembered that what is at stake here is suppression of expression presumptively protected under the First Amendment.

Lastly, it should be noted that the Fourth Amendment protects persons as well as their possessions from unlawful searches and seizures. The arrest of a person without the requisite probable cause constitutes a seizure of the person no less violative of the Fourth Amendment than the seizure of such person's possessions since

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (underlining supplied). U.S. Constitution, Amendment IV.

As was stated heretofore, any seizure, whether it be by arrest of a person or seizure of expressive material, which effects a prior restraint in violation of the First Amendment constitutes an unreasonable seizure within the meaning of the Fourth Amendment. Roaden v. Kentucky, supra. That the warrantless arrest of a dancer in the midst of her performance, solely on the ad hoc obscenity determination of a policeman, and without judicial scrutiny, constitutes such an unconstitutional prior restraint is incontrovertible.

CONCLUSION

The Statute is unconstitutionally overbroad on its face and as applied to the prior restraint of live dance performance by means of warrantless arrests without prior judicial scrutiny in violation of the First, Fourth and Fourteenth Amendments.

Respectfully submitted,
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